UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST (PERMANENTE MEDICAL GROUP, INC.)

and

Case No. 20-CB-113164

ANGELA A. FOGGY A.K.A. ANGELA A. JOHNSON

David Reeves, Esq., San Francisco, CA for the General Counsel Bruce A. Harland, Esq., Weinberg, Roger & Rosenfeld, Alameda, CA for the Respondent

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Sacramento, California on February 18 and 19, 2014. The captioned charge was filed on September 10, 2013 by Angela A. Foggy a.k.a. Angela A. Johnson (Johnson). On November 27, 2013 the Acting Regional Director for Region 20 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Service Employees International Union, United Healthcare Workers-West (Respondent or Union) of Section 8(b)(1) (A) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

At all material times, the Permanente Medical Group, Inc. d/b/a Kaiser Permanente South Sacramento Medical Center (Employer) has been a corporation with an office and place

of business located in Sacramento, California and has been engaged in operating a hospital providing inpatient and outpatient medical care. In the course and conduct of its business operations the Employer purchases and receives at its South Sacramento facility goods valued in excess of \$5,000 which originated directly from points outside the State of California. I find that at all material times the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

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II. The Labor Organizations Involved

It is admitted, and I find, that the Respondent is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding is whether the Respondent has violated Section 8(b)(1)(A) of the Act by failing and refusing to bring Johnson's grievance to arbitration for discriminatory, arbitrary and perfunctory reasons.

B. Facts

Angela Johnson, the Charging party herein, worked for Kaiser Hospital from April 9, 1999 until the date of her discharge, March 30, 2009. At all material times herein she was a member of the collective bargaining unit represented by the Respondent. During her ten-year tenure she had never received written discipline for any infraction although she had received prior counseling.

During the six years prior to her termination she was a program assistant in the hospital's chronic pain management clinic. She performed a wide range of duties. One of her duties prior to her termination was to make the initial appointments for the pain management patients, schedule their procedure, and thereafter remind them of their subsequent periodic office visits. The patients who would be receiving periodic cortisone injections because of their chronic pain were sent a packet of information explaining the procedure and emphasizing that it was important for them to cease taking certain blood-thinning medications three days prior to their cortisone injection as this could be dangerous and result in excessive bleeding; and moreover, that If they neglected to do so the physician would not be able to administer the cortisone injection. One of Johnson's duties, which Johnson describe as "a low job on my totem pole," was to make confirmation calls to the patients two or three business days prior to their appointment. Johnson testified:

A confirmation call is basically just calling the patient and saying you have this appointment, remember? I'm just calling to remind you of your appointment. And you should have got your packet in your mail, and it tells you that you need to stop these medicines. So I'm just making sure you stopped, you know, your medications and just reminding them of their appointment. If they had co-pays, reminding them, you know...

¹ The record is unclear whether the calls were to be made two days or three days prior to the appointment.

According to Johnson, while it was important to make these confirmation calls, it was the lowest priority job to be performed during her busy day, as she was also occupied with many other duties. Moreover, according to Johnson, as a practical matter, the reminder was not critical as the patients already knew or should have known from the information contained in the packet they had received and/or from prior calls and appointments that they were to cease taking their medications prior to the visit. Thus, if Johnson would call the patient's phone number and the call would be picked up by the patient's answering machine, a common occurrence, Johnson would merely leave a message reminding the patient of the appointment and, in accordance with HIPPA regulations, was not permitted to say anything about discontinuing their medications as such information was not to be divulged to third parties who might listen to the telephone messages. The record contains no evidence that in the event the patient's answering machine picked up the call there were any further attempts made to reach the patient directly. One reminder call was sufficient.

Nevertheless, Johnson acknowledged during her testimony that it was important for the calls to be made and to at least attempt to remind the patient to discontinue their blood-thinning medications two or three days prior to the office visit. It was also necessary for Johnson to document the fact that she had made the calls by entering the date and time of each call in the computer system, and note whether she had talked to the patient or had simply left a message.

March 20, 2009 was a particularly hectic Friday. Johnson testified that the department was short staffed with only a "skeleton crew" and she not only had to perform her multiple duties but also the duties of other absent personnel. At the end of the day she began making the reminder calls to patients who had appointments scheduled for the following Tuesday, March 24. However, she was unable to complete all the calls during the regular workday. She did not ask permission to work overtime to complete her calls that day as, according to Johnson, overtime work in that department was not permitted because of budgetary considerations. She did not advise her supervisor that because of other pressing duties she was unable to make the calls that day because the calls were of low priority or equally as important as other duties and "we never did it like that." Thus, Johnson testified, "if we had calls to continue over, then we would just call them the next day." Johnson further testified:

...the way the clinic ran and the way we had done it for years, six years, was that if we didn't call them that day, if we couldn't get to it that day, then we got to it as soon as possible, the next day...Because there were so many things that were more—not more important. I can't say that they were more important. But there were so many things that we had to do in the clinic that we didn't put off just to give a reminder call for the appointment.

Early on Monday morning, March 23, Johnson continued making the reminder calls that would have been made on Friday, giving the patients only a one-day reminder of their scheduled appointments for the next day, Tuesday, March 24. Upon continuing to make these calls that should have been made on the preceding Friday, she documented each call by inadvertently, according to Johnson, entering the date March 20 rather than the correct date, March 23 because, as she proceeded with the reminder call-list, she mistakenly entered the date of the last entry she had made on March 20 for each successive reminder call. She did not realize that she kept repeating the same mistake for all the reminder calls that should have been

made on March 20. She did not testify that she had ever made a similar mistake by entering the wrong date of reminder calls in the computer system.²

The record shows that it was highly unusual for personnel to check the computer system or monitor Johnson's work to see if calls were being timely made, but for an unknown reason Johnson's computer records were checked the morning of March 23 even as Johnson was making the calls. As noted, the records reflect that Johnson was entering the date March 20 for the calls she was making on March 23. Further, as was later learned by Johnson, a supervisor phoned the patients that Johnson had called that morning and asked when they had received the reminder calls and the patients verified that they had received the calls on Monday rather than Friday.

Three days later, on March 26, Johnson was summoned by her supervisor, Assistant Department Manager Rose Campbell, to Campbell's office and told to bring a shop steward. Johnson was the only shop steward in her department, and she first met with Shop Steward Dawnyielle Moore. Johnson told Moore she didn't know why she was being called to the office. Because Moore, like Johnson, was a relatively new shop steward, Johnson told Campbell and two other individuals in addition to Campbell who were present on behalf of the Employer, that she did not feel comfortable with Moore as a representative. The Employer then summoned another shop steward, Sheryl, whom Johnson did not know. Johnson said she didn't feel comfortable having Sheryl represent her either. Nevertheless Campbell began the interview.

Campbell began by asking Johnson whether she understood the confirmation call quidelines. Johnson indicated that she understood the quidelines, and that she understood the importance of calling and confirming the patients' appointments three business days in advance because it was important for certain patients to cease their medications prior to their appointments. Johnson said she knew her job. She does not recall whether Campbell handed her the computer logs showing that she had made the calls on March 23 rather than on March 20. She does recall, however, being asked about the dates of the confirmation calls, and responded, "Well, what's this got to do with anything?" She also told Campbell, "...if I put down that date, that's the date I called them." Asked by Campbell whether she talked to each of the patients and told them to stop taking the blood-thinning medication because she knew how important it was. Johnson replied to Campbell that she always did that because she knew how important it was. At the end of the interview Johnson was placed on suspension pending termination. Johnson testified that even at that point she did not understand why she was being interrogated or why she was suspended pending termination; nor had she realized she mistakenly entered the incorrect date of March 20 for the reminder calls she made on March $23.^{3}$

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² The testimony of Johnson regarding her job duties and the relative importance of the confirmation calls is background for the events occurring thereafter, and is neither credited nor discredited. The Employer did not participate in this proceeding.

³ It appears from Johnson's testimony that she was concerned about her tenure for several reasons and opined that underlying the decision to coach or reprimand or terminate her were other considerations, namely, that the department might be closing and/or jobs were being consolidated and supervision preferred someone with less seniority to take her place; or that someone was attempting to find a job for a friend and wanted to create an opening in the department to accommodate the friend; or that in the department there were overtones of racial discrimination toward Johnson. Johnson believes that prior to her discharge she was being harassed, and that "they drowned me in work because they wanted me to fail."

Following the meeting, Johnson told the shop stewards that she did not understand why she had been called into the office and did not understand why she was being asked about dates and procedures.⁴ Union Shop Steward Sheryl told Johnson that the Union would file a grievance.

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On March 30, 2009 in the presence of shop steward Celia Morrison, Johnson was handed a letter from Campbell headed "RE: TERMINATION OF EMPLOYMENT—FALSIFYING RECORDS," in pertinent part as follows:

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On March 26, 2009, an investigation was conducted in regard to allegations that you falsified patient records. The allegations consisted of a review of confirmation calls to patients that you stated and documented you made on Friday, March 20, 2009.

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Based on the investigation, it was found that you falsified the dates and actually called the patients on March 23, 2009. Kaiser Permanente policies require that you accurately record information into the patient record. Based on your failure to do so, you placed patients at possible harm and risk.

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Based on these findings, it has been decided to terminate your employment.

The record evidence is unclear regarding Step 1 of the grievance process. On April 8, 2009 the Union filed a Step 2 grievance for "Unjust cause for termination" and, in the form to the employer entitled "Notice of SEIU Grievance Action," requested from the Employer "Any and all information used for termination: Names, Phones, Emails Etc."

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The Step 2 grievance meeting was held on May 21, 2009. Union Representative/Organizer Jacob Pridgen-Daniels represented Johnson at the meeting. Johnson explained to the Employer's HR personnel that Friday, March 20 had been a very busy day; that Johnson was the only one answering the phone, making the appointments, and making the confirmation calls that day; and that on Monday March 23 she continued making the calls and unintentionally recorded the date of March 20 because as she continued making the calls from the preceding Friday she saw that date at the top of her screen; and that no one ever gets discharged for accidentally entering the wrong date. Pridgen-Daniels argued that Johnson should be put back to work because she had merely made an unintentional mistake.

During a subsequent phone call which Johnson initiated, Pridgen-Daniels advised her that the Step 2 grievance had been denied and the grievance would have to be taken to Step 3.

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The Step 3 grievance meeting was held on July 7, 2009 by video conference. Johnson, Pridgen-Daniels, and Union Contract Specialist Kim Tinsley were present in a room at the Employer's premises, and the Employer's representative, Senior Labor Relations Consultant David Isaacs, was at a different location. Johnson related to Isaacs essentially the same explanation she had made on her own behalf at the Step 2 grievance meeting. Upon completing her explanation, Isaacs said, according to Johnson, "If what you're telling me happened...it

⁴ In fact Johnson testified that she did not know what she had done until sometime prior to Step 2 of the grievance process when Pridgen-Daniels suggested to her that she simply must have made a mistake. At that point the union presented this rationale to the employer, maintaining that the incorrect entries Johnson made in the computer system were inadvertent and should not have resulted in termination.

seems like you just made a simple mistake and it seems like an open and shut case. I'll talk to your manager."

On July 9, 2009 Isaacs sent the following letter, in pertinent part, to Pridgen-Daniels:

After reviewing the grievance file and discussion with Management I do not find a violation of the collective bargaining agreement. The grievant was terminated for falsifying patient records after she contacted patients regarding their appointments on Monday, March 23, 2009, but documenting that the calls were made on Friday, March 20th. The Grievant and Union stated that this was unintentional. What was not explained during the Step III meeting is that not only does the grievant remind the patients about their appointments, but also tells the patients that they need to stop taking blood thinning medication prior to their visit. This is the reason for the two (2) day notice requirement. Patients who fail to stop taking their medication during this time period cannot be seen during their scheduled appointment time and must be rescheduled. This was a glaring omission of facts.

Based on the above, the Step III grievance is respectfully denied.

After attempting to call Contract Specialist Tinsley several times over a two-week period, Johnson finally spoke with Tinsley and was told that her Step 3 grievance had been denied. Johnson asked about arbitration as the next step, and Tinsley said the case would be appealed to an arbitrator. Tinsley told her to look for another job and that "arb (sic) is so backed up...It's going to be two to four years before you're even called." Johnson had several subsequent and similar conversations with Tinsley, and at one point Tinsley asked Johnson to send her a resume, apparently so that Tinsley could attempt to assist Johnson in finding other employment.

Johnson filed for unemployment compensation with California EDD. Her claim was initially denied. Upon appeal, on about September 23, 2009 the administrative law judge reversed the original determination and found that Johnson was entitled to unemployment benefits. The ALJ determined that Johnson had made an "inadvertent mistake by misidentifying the call date, that the conduct was "not willful or wanton in character," and that Johnson "was discharged for reasons other than misconduct connected with her most recent work."

Upon receiving this favorable decision Johnson again attempted to contact Tinsley and after multiple attempts was finally able to speak with her. Johnson told her she had won her unemployment case and asked whether Tinsley needed to see it and Tinsley said no. Therefore Johnson did not send it to her.

On February 16, 2010 Johnson sent identical letters to two Union representatives, La Tasha Winslow and Kim Tinsley, which contain Johnson's then-current address and phone number. The letters state:

My name is Angela Johnson and this letter is regarding my wrongful termination from Kaiser Permanente's Pain Management Clinic at South Sacramento. I started my career with Kaiser 4/9/1999 and I was hastily

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and wrongfully terminated from Kaiser Permanente on 3/30/2009. My case was denied at step 3 grievance in or about June or July 2009, therefore I am requesting that my case be heard in arbitration as soon as possible. Please contact me if you have any questions regarding the logistics of this case.

Thank you for your time and consideration.

In 2010 Johnson began supporting a rival union that was attempting to organize the Employer's employees. She complained about her unwarranted discharge and, along with two other employees, was featured in a flyer dated April 23, 2010, that the rival union, National Union of Healthcare Workers (NUHW) disseminated among the Employer's employees. Johnson's name, job title and photo appear on the flyer, opposite the following message:

IGNORED.

After nearly 10 years at Kaiser South Sacramento I was terminated on trumped up charges that could have been fought if I had had the right representation from SEIU-UHW. SEIU-UHW did not file the grievance on my behalf until nearly 2 months after I was terminated. **SEIU-UHW's negligence is the reason I was denied unemployment benefits and I had no means of an income for 6 months.** The EDD appeals court judge ruled against Kaiser's position and I was finally granted my unemployment benefits, but this was WITHOUT any help from the SEIU-UHW. (Emphasis in original.)

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Johnson began handing out the flyers in the parking lot of the Employer's facility soon after she was given them by Pravindra Singh, an employee who was one of the leaders of the NUHW organizational movement. Johnson testified that Tinsley came up to her "really fast and really angry," and asked what Johnson was doing. According to Johnson, Tinsley "was like in my face like maybe seven, eight inches away from me." Johnson said she had a right to be there and hand out the flyers and Tinsley "kept cussing at me and trying to run me off the property and looking like she wanted to fight me." Tinsley looked at the flyer and said, "Get your ass off this property and take this (sic) damn flyers with you...before I call the police." Johnson left to avoid further argument, but continued passing out the leaflets on the sidewalk adjacent to the entrance of the parking lot.

By coincidence, Singh, a former chief steward of the Union who became active on behalf of the rival NUHW, shared an office with Tinsley at the Employer's facility. Singh testified that on the fourth floor of the parking structure, as he and others were passing out the flyers, Contract Specialist Tinsley and an HR representative approached them. The HR representative told Singh that they could not be passing out the fliers in the parking structure, and "Tinsley echoed everything" that the HR representative said. Singh testified they were "threatened" because the HR representative said the police would be called, and Singh replied that they could go ahead and call the police, as he and the other employees had a right to be distributing the flyers at that location. Singh testified that Johnson was not with his group as she was in a different parking lot passing out fliers.

Singh testified that sometime after the flyer naming Johnson had been distributed he had a conversation with Tinsley about it in their common office. Singh testified that he and Tinsley critiqued each other's fliers, "and had a kind of healthy but non-healthy relationship." Tinsley was critiquing the flier in question which, in addition to Johnson's photo and article, also

had photos and articles about two other individuals who were complaining about their wrongful terminations and about the lack of adequate representation by the Union. Tinsley said, according to Singh, "They ain't never getting their job back," and walked off.

Employee Shannon Scott, who also supported the NUHW, was present during this interchange between Singh and Tinsley. Scott testified that Tinsley began talking about each of the individuals named in the flyer, including Johnson. According to Scott, as a contract specialist Tinsley would know about the cases of terminated employees "because that's what a contract specialist is supposed to know." Tinsley knew the facts about the discharged individuals and related to Scott and Singh what she knew and why the individuals had been terminated; however Scott was unable to recall Tinsley's comments about each one. As Tinsley walked out the door she said, "They're not going to get their jobs back or words to that effect."

Kimberly Wilkes (formerly Tinsley and hereinafter referred to as Tinsley) is currently chief steward. From June 2009 until December 2010 she served as a contract specialist. Tinsley testified that she had been appointed contract specialist only shorty before Johnson's Step 3 grievance meeting on July 7, 2009 and that she attended the meeting solely as an observer and did not participate. She did recall that at the meeting the Union Representative Pridgen-Daniels made the argument on Johnson's behalf that Johnson's misdating of the records was unintentional. Tinsley has had no involvement with Johnson's grievance since that date.

Tinsley denied that she had a confrontation with Johnson in the Employer's parking lot while Johnson was leafleting, and denies that Johnson ever attempted to hand her a flyer. Tinsley was present, however, when a group of some 21 individuals were warned by an employer representative that they should not be leafleting on the Employer's premises; and according to Tinsley, Johnson was among those individuals but Singh was not.

Tinsley testified that she had probably seen the April 23, 2010 flyer with Johnson's photo, as she had seen many flyers distributed by the NUHW during the election campaign; moreover she did know those individuals named in the flyer. However, she denies any conversation with Singh about the flyer or about Johnson, as during that period of time she did not discuss union matters with Singh, who was supporting the rival NHUW.

Apparently, attempting to elicit Singh's help or to give him further information to prepare additional flyers, Johnson sent a lengthy email to him, entitled "termination testimony," detailing her efforts to receive satisfaction from the Union. The email, dated May 8, 2010, contains the following:

I have made countless phone calls, sent certified letters, and sent email to SEIU, especially to Kim Tinsley and Latasha Winslow-Beavers, inquiring about an arbitration date. Every time I've asked about arbitration they've told me that they don't know when I would be able to set an arbitration date because it was so backed up and that there's absolutely no way they could give me a date. I was told that I would get a letter in the mail...(sic) it's still in the mail. Every time I've talked to Kim Tinsley and asked her about setting an arbitration hearing she tells me she has no date, wait for a letter in the mail and instead of receiving positive affirmation or solutions, she always asks me if I am looking for another job and that I should just find another job...

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Johnson did not find another job until August, 2010, and this required her to move out of the area. Johnson called the union hall on various occasions to inquire about her position on the arbitration list and her arbitration date, and was simply told not to worry about it and that her name was on the arbitration list. While her testimony is unspecific on this point, Johnson made about two such calls in 2011 and about two such calls in 2012. Johnson never received a letter from the Union telling her that her arbitration had been withdrawn, *infra*.

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In July, 2013, four years after her discharge, upon the advice of a different union representative. Johnson went to the union hall to find out what was happening with her arbitration as she had been told that it could take as long as four years for her case to come to arbitration. She spoke to Field Representative Alex Martinez and another union representative, Celia Morrison, who knew Johnson. Morrison said that Johnson's name had previously been on the arbitration list but was not currently on the list, and told Johnson that she too had asked questions about the matter as she also wanted to know the reason for the deletion of Johnson's name from the arbitration list. Martinez went to look for her file, apparently believing that something in the file would indicate why Johnson's name was no longer on the arbitration list, but was unable to locate the file. Martinez told Johnson that "a lot of things were happening in 2009 and that people took files." He said he would look for it and call her when he found it or that she should call him at the end of a week. The file was not found. Martinez suggested that Johnson obtain her employment file from the Employer, apparently believing that there would be information in the file regarding the grievance. Shortly thereafter Johnson did so, with the assistance of union representative Morrison, but there was nothing in the file regarding the status of her case.

As a result of the Union's failure to advise her of the status of her case, Johnson filed the instant charge on September 10, 2013, still not knowing that her case had been withdrawn, *infra*.

Alejandro Martinez has worked for the Union for nearly five years and is currently a field representative/organizer. Prior to his employment by the Union he worked for the Employer for fourteen years, and during most of this time was a shop steward and chief steward. Upon becoming a union representative he was assigned to different locations in California. He was not assigned to South Sacramento, where the pain clinic at which Johnson worked is located, until August 2011, over two years after Johnson's discharge. Martinez testified he first met Johnson when she came to the union hall in June or July 2013 inquiring about her grievance. He had never spoken to her before that. Upon meeting with Johnson he searched for and thereafter inquired about the Union's file regarding her grievance. He was unable to locate it.

Martinez testified that on January 17, 2012 some six months prior to meeting with Johnson, he had participated in an arbitration review process, along with Contract Specialist Jimmy Hardy, at that time the contract specialist for the Sacramento area including the pain clinic, and Director of Representation Excellence Marcus Hatcher. These three individuals reviewed a substantial number of grievance files that were pending arbitration at that time. Among many other grievance files that were pending arbitration was the Union's file for Johnson's grievance case. Martinez testified that he completed and placed the date January 17, 2012 on a form headed "Kaiser Arbitration Review." Upon reviewing the file it was decided

⁵ Martinez was not asked whether in June or July 2013, when he first met and spoke with Johnson, he recollected that he had participated as a member of the review panel for Johnson's grievance.

that the grievance lacked merit and should be withdrawn. Kim Tinsley was not present and was not at all involved in this review process.⁶

The file was not located until about a week prior to the opening of the hearing in the instant matter during a meeting with the Union's counsel in preparation for the hearing. At that time the Union's attorney asked Martinez where he kept his oldest cases. Martinez testified that he began looking in a box of papers in the Union's office and found the file, paper-clipped together within a pile of other documents. It had not been filed in a file cabinet and was not in a folder. These are the documents that Martinez and the other two representatives reviewed in making the decision to withdraw Johnson's arbitration. They reviewed a "substantial number" of cases that were set only for South Sacramento arbitration.

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Prior to the review process on January 17, 2012 Martinez and the other two members of the Union's review panel knew nothing about Johnson's case. They solely relied upon the documents in the Union's file. The file consists of the following: the March 30, 2009 discharge letter from Assistant Department Manager Campbell to Johnson specifying that Johnson was being terminated for falsifying patient records by falsifying the dates of confirmation calls; the employer's computer records documenting that on March 23, 2009 Johnson made numerous confirmation calls that should have been made on March 20, and entered the date of March 20 on the Employer's records; a document noting that one of Johnson's responsibilities was to "Call all patients up to 3 days in advance reminding them that if they are having a procedure then they will need to stop their anticoagulants..."; the various union forms entitled "Notice of SEIU UHW Grievance Action"; the Employer's Step 2 and Step 3 letters denying the grievance; and two identical February 16, 2010 letters from Johnson to union representatives Tinsley and Winslow, containing Johnson's phone number and then-current address, in which Johnson requested that her case be heard in arbitration as soon as possible and that she be contacted "if you have any questions regarding the logistics of this case."

Marcus Hatcher has been Director of Representation Excellence for the Respondent since December 2011. He was the "inaugural one," as prior to this time there was no such position. He had had considerable prior experience with the Union and had been director of representation for another SEIU local and, in this capacity, had represented workers in arbitrations and served as the final person making recommendations regarding arbitration.

The program which Hatcher headed was adopted by the Union in the spring or summer of 2011. Hatcher testified that the Kaiser unit represented by the Union was a statewide unit consisting of some 45,000 members, and at that point a significant backlog of over 700 cases pending arbitration had accumulated, primarily because an arbitrator who was authorized to arbitrate these cases had passed away, and for a period of time a successor had not been agreed upon. Accordingly it had been decided to review the merits of these cases and, using the standard of whether the Union was likely to prevail in arbitration, to withdraw the cases that

⁶ I credit the entire testimony of Martinez who appeared to be a forthright witness. I find no substance to the assertion of the General Counsel in his brief that this testimony of Martinez was a complete fabrication and that in fact neither Martinez, Hatcher nor Hardy had reviewed the documents prior to sending the withdrawal letter to Johnson as they did not even have the documents until a week prior to the hearing in this matter.

⁷ I credit the testimony of Martinez who appeared to be a credible and forthright witness with a refreshed recollection of the review process pertaining to Johnson upon examining the aforementioned file documents.

were deemed to be unwinnable, thus speeding up the arbitration process. Prior to this time there had been no arbitration review process.

Hatcher designed the review process, and he was involved in the review of each case. In the event that the review panel decided the case should be withdrawn a letter was sent to the employee advising that the case had been reviewed with "input from member leadership and staff, and knowledge of the interpretation of the applicable collective bargaining agreement," and that the employee could appeal this adverse determination to an impartial, member-based appeal panel that would make the final decision. Moreover, if it was determined that there was not enough information in the file to make an informed determination regarding the merits of the grievance, then the next step would be to secure adequate information and continue the review at a later time.

Hatcher testified that on January 17, 2012, along with Martinez and Hardy, he reviewed all the documents in Johnson's file. The final decision, however, was Hatcher's to make. After some discussion all three individuals agreed that Johnson's case should be withdrawn. Hatcher testified that he understood the Employer's allegation against Johnson to be that she had falsified the date on which she made confirmation calls to patients; that, according to the documents in the file, there was no denial that she had entered the wrong date for a number of such calls in the Employer's database; that these were calls that should have been timely made; and that "it seemed too big of a coincidence that they [the calls] were made exactly when they were supposed to be made for the purpose of contacting the patient"; that "...it just seemed, again, a far stretch that it was just an accident...and I didn't think the grievant was credible." The recommendation was to withdraw the grievance, as Hatcher Martinez and Hardy did not think the Union could prevail in arbitration. Hatcher testified that during the review of Johnson's grievance there was no discussion of Johnson's NUHW activity. He also testified that "falsification is almost always intentional. In an overwhelming majority of cases the penalty is termination." Asked, "Is it your testimony that you decided to withdraw this grievance because it was your conclusion that Angela Johnson intentionally falsified those records," Hatcher answered, "Yes.".

However, considering Johnson's tenure with the Employer, Hatcher believed the Union "could potentially secure a settlement for her in lieu of the arbitration process." He attempted to do this, working with the Employer's HR representative, but was unsuccessful as the HR representative was unwilling to settle. Accordingly, on March 7, 2012 the Union sent a letter to Johnson's address contained in the Union's database, both by certified mail and regular mail, as follows:

RE: NOTICE OF GREIVANCE WITHDRAWAL

Dear Mrs. Johnson,

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This letter is to inform you that after careful consideration that included a thorough review of the details of your case, input from member leadership and staff, and knowledge of the interpretation of the applicable collective bargaining agreement, SEIU UHW ("the Union") does not believe that we are likely to prevail in arbitration and subsequently do not intend to further pursue the above referenced grievance to arbitration.

Therefore the Union's decision is to withdraw the grievance. If you disagree with this decision you may appeal it to the Regional UHW Appeal Panel. To do so,

you must contact the Panel by either mailing a letter to Marcus Hatcher, or sending an e-mail to ...not later than ten (10) days from the date of this letter. If we do not hear from you by this date, the Union will withdraw the grievance with the employer.

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Sincerely,

Marcus Hatcher

Representational Excellence Director

SEIU United Healthcare Worker's -West

The certified mail and regular mail letters sent to Johnson were returned to the Union on March 14 and March 15, respectively. Both envelopes bear a post office stamp stating:

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Return to sender Not deliverable as addressed Unable to forward

Johnson has moved three times since her discharge

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From March 2, 2012 to December 24, 2012 some 180 similar withdrawal letters were sent by the Union to advise individuals on the arbitration list that their grievances were being withdrawn absent their appeal of this determination.8

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C. Analysis and Conclusions

The complaint essentially alleges that although Johnson's grievance was pending arbitration and was initially on the arbitration list the Respondent failed and refused to bring Johnson's grievance to arbitration for discriminatory, arbitrary and perfunctory reasons, thereby violating Section 8(b)(1)(A) of the Act. The complaint also alleges that Since about May 2013, and continuing to date. Respondent has failed and refused to inform the Charging Party about the status of her grievance."

There is no showing that any representative of the Respondent who had knowledge of Johnson's support of the rival NUHW played any part in the processing of her grievance at the several steps in 2009 or during the subsequent review of her grievance in 2012.

After the Step 3 grievance had been denied on July 9, 2009, Tinsley told Johnson that her case would be placed on the arbitration list and advised her to find another job because "arb (sic) is so backed up...It's going to be two to four years before you're even called." As noted, Johnson had several subsequent and similar conversations with Tinsley, Thus, given the arbitration backlog, Tinsley was giving Johnson sound advice.

It was not until April 23, 2010, some 9 months after the denial of the Step 3 grievance, that Johnson's photo and article appeared on the NUHW flyer. I find that Tinsley did make the

⁸ It appears that at some point this review process was discontinued, as Hatcher testified, "We didn't get an opportunity to review all 700 for a variety of reasons."

⁹ The complaint does not allege any failure of the Union to fairly represent Johnson either during the three-step grievance process, or during the time the grievance was pending arbitration, that is, before the Union's withdrawal of the grievance.

statements attributed to her by Johnson and Singh and Scott. Rather than attempting to explain the circumstances surrounding the conversations, or why she believed the grievances of the employees featured in the flyer lacked merit, she simply denied that the conversations took place. As a result of Tinsley's uncredited denial of such statements it may be inferred that the statements indicate some degree of animosity toward supporters of the NUHW. However, there is no showing that during that period of time the Union was actively processing the grievance or was doing anything other than waiting for the arbitration to be scheduled.

The union election was conducted by mail ballot in September and October of 2010. The NUHW did not prevail and the Respondent remained the collective bargaining representative of the Kaiser unit.

As noted, in mid-2011, while Johnson's arbitration was pending, the Union determined that something needed to be done about the some 700 pending arbitrations. To expedite the arbitration process it was decided to establish an internal review procedure whereby each grievance file would be reviewed and a determination would be made as to the merits of the grievance. Those grievances that appeared meritorious and had a likelihood of being winnable remained on the arbitration list, while the grievances which the Union believed would likely be dismissed were to be withdrawn. However, to safeguard the interests of the latter group of grievants an appeals procedure was established that provided them with the opportunity to appeal the Union's refusal to bring their grievance to arbitration.

Johnson's file was reviewed on January 17, 2012, and it was decided to withdraw her grievance and remove it from the arbitration list. The General Counsel contends that Johnson's file was woefully inadequate and incomplete, and the limited documents therein could not reasonably provide the three reviewers with sufficient information to render a determination that her grievance was non-meritorious.

Further, the General Counsel maintains that prior to the date of the review the failure of Tinsley and other union representatives to undertake a thorough investigation of the matter and to create an adequate file in 2009 and thereafter amounted to arbitrary and perfunctory conduct. Thus, the union representatives failed to take statements from Johnson and other employees in Johnson's department; they failed to request and obtain sufficient information from the Employer regarding the discharge; and they failed to obtain a copy of Johnson's EDD award that Johnson had offered to furnish Tinsley. Had they done so, the file would have contained sufficient information so that when, in 2012, the review of Johnson's arbitration case was undertaken by the review panel, none of whom had any firsthand information regarding Johnson's grievance, these individuals could have made an informed decision regarding the merits of her case. Having no information other than what the Union had obtained from the Employer in the file, and solely relying on such information, the three union representatives necessarily made a perfunctory administrative decision in an effort to simply reduce the Union's arbitration backlog without due regard for Johnson's right to receive fair representation by the Union.

Johnson, the only union steward from her department, was also, insofar as the record shows, the only person in the department who made confirmation calls to patients who were to receive injections, and therefore the only person who would understand the relative importance of such calls in conjunction with her other duties. There is no contention and no complaint allegation that Johnson, with the assistance of the other union representatives, did not have the opportunity to present her explanation regarding anything that she wanted to explain or to present other evidence in her defense during the various grievance meetings.

Following the denial of the Step 3 grievance the matter was placed on the arbitration list. There is no evidence that, given the two to four year waiting period for matters to come to arbitration, the Union's customary procedure was to thoroughly investigate the matter in the interim and prepare a complete file in anticipation of arbitration some four years later. Although there was a lengthy waiting period, it may be reasonably presumed that union representatives who were involved in the presentation of Johnson's grievance simply believed that nothing more remained to be done by them, and that prior to the arbitration the union representative responsible for bringing the matter before the arbitrator would confer with Johnson as the initial source of all the information that was needed to counter the Employer's evidence. In this regard, insofar as the record shows, Johnson's case was treated no differently than any of the other hundreds of grievances pending arbitration. Further, at that time there was no arbitration review process in effect; accordingly, there was no reason for the union representatives to anticipate that the information contained in the Union's file alone, without more, would be used to determine the merits of Johnson's grievance.

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It was not until approximately two and one-half years later, in early 2012, that the Union undertook to reduce the arbitration list in accordance with its newly instituted review process. And as a necessary component of the review process the Union established an appeal procedure to provide a safety-net for adversely effected employees to appeal an adverse determination. Significantly, as noted, the complaint does not allege that the design or implementation of the review process, in and of itself, constitutes an arbitrary, perfunctory or otherwise unlawful abdication of the Union's responsibility to fairly represent the unit employees.

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The review panel was comprised of veteran union representatives with many years of grievance and arbitration experience. The panel, headed by Hatcher, ¹⁰ determined that no further information was needed to render a determination regarding the merits of Johnson's grievance. Hatcher concluded that Johnson's repeated entering of incorrect dates was too coincidental to be inadvertent, that in fact Johnson had intentionally falsified documents as maintained by the Employer, and that the Union was not likely to prevail in arbitration. The two other members of the panel were in agreement with Hatcher's conclusion. ¹¹ As a result the withdrawal letter was sent. I do not find that Hatcher's determination was perfunctory or arbitrary or irrational. Even assuming *arguendo* that it was erroneous, as the General Counsel maintains, there is no showing that it was not a considered judgment made in good faith and based on a fair comprehension of the information in the file.

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The General Counsel maintains that it was a patently erroneous determination and that if Hatcher and the panel would have known that, according to Johnson, during the course of the July 7, 2009 grievance hearing Senior Labor Relations Consultant David Isaacs agreed that Johnson had simply made an inadvertent mistake, the panel would have discerned that Isaacs, after "discussions with Management," seized upon a different rationale in the Step 3 denial

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¹⁰ I credit the entirety of Hatcher's testimony. Hatcher appeared to be a credible witness with a solid recollection of the of the Union's file documents pertaining to Johnson's grievance and a forthright and convincing explanation underlying his determination that the Union would not be likely to prevail in arbitration.

¹¹ Contract Specialist Hardy did not testify in this proceeding. The General Counsel argues in his brief that it should be presumed that Hardy was aware of Johnson's 2010 dissident union activity on behalf of the NUHW because he must have discussed such matters with Tinsley. There is no record evidence to support this argument. Moreover, even if Hardy was aware of Johnson's dissident union activity, Hatcher's testimony that Johnson's grievance was withdrawn because it lacked merit is persuasive and supported by the material Hatcher reviewed.

letter by, in effect, finding that although the misdating was inadvertent, nevertheless failing to make the calls in a timely fashion was a serious mistake that in and of itself warranted discharge; in other words, Isaacs himself was impliedly admitting that Johnson's misdating of the records was not conduct warranting discharge. While the General Counsel's argument is creative, the clear import of Isaacs' Step 3 denial letter is that, upon further review with management, Isaacs reasoned that the omission of highly essential facts during the grievance meeting enforced Campbell's determination that the misdating was indeed deliberate in an attempt to hide the fact that very important calls should have been timely made.

The General Counsel also argues that because of the serious implications resulting from the Union's Notice of Grievance Withdrawal letter, and upon return of the letters as undeliverable from the post office, the Union should have searched the file for contact information and taken other means to contact Johnson. Thus, as Johnson testified, her phone number had not changed since her discharge, and she had included her phone number and then-current address in the February 16, 2010 letter she sent to union representatives which letters were in the file reviewed by the review panel.

Hatcher testified that a combination of certified and regular mail was the means used to communicate with employees to advise them that their grievances were being withdrawn and to further advise them of the appeal process. In this regard, Johnson was not treated any differently than any of the 180 employees who received similar letters. 12 The record shows that Johnson moved three times since her discharge. She knew or should have known that the address the Union had on file was her address as of the time she was working for the Employer. Moreover, as Johnson notes and emphasizes in her May 8, 2010 email to Singh, on each of the various occasions when she inquired about her arbitration she was told by Tinsley that she would receive a letter in the mail. Further, as Johnson abundantly testified, she believed that she could not rely on communications with union representatives by phone, as they would not return her phone calls: rather, she would have to be the one who initiated the call. Although she maintains that she left forwarding addresses, it is not unreasonable to expect that if she was anticipating an important letter from the Union she would not rely on forwarded mail but would keep the Union apprised of her current address each time she moved. While, as noted, she wrote a letter to union representatives in 2010 containing her phone number and then-current address, this was not the address where she was living in 2012 when the Notice of Grievance Withdrawal letter was sent to her. Moreover, union representatives Tinsley and Winslow, the recipients of the letters, could not be charged with the responsibility of updating her address in the Union's database unless she specifically requested that they do so. Accordingly, I find that the responsibility for having not received the Notice of Grievance Withdrawal letter lies with Johnson and not the Union, as the Union was not acting in an arbitrary or perfunctory manner by relying on the method it used to advise grievants of the withdrawal of their grievances. Accordingly, I find that despite Johnson's continued, futile and understandably frustrating attempts over the years to learn the status of her arbitration, her failure to receive the Union's withdrawal letter is directly attributable to her lack of due diligence in updating her address with the Union. 13

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¹² It appears, according to the General Counsel, that two of the some 180 individuals who were sent such letters were sent subsequent letters following the return of the original letters. The record does not note why this occurred.

¹³ The General Counsel maintains that the instant charge was timely filed as to this issue as Johnson had never been advised and did not know that her grievance had been withdrawn. The Union maintains that Johnson would have been timely advised of the withdrawal of her grievance had she updated her address with the Union, and therefore the charge should be

The General Counsel asserts in his brief, as an alternative theory, that the testimony of Martinez and Hatcher relative to Johnson's file is a complete fabrication, and that in fact neither Martinez, Hatcher nor Hardy could have reviewed the file documents prior to sending the withdrawal letter to Johnson because they did not even have the documents until a week prior to the hearing in this matter; rather, they were just disposing of Johnson's case in an arbitrary and peremptory manner in order to reduce the arbitration backlog and/or because of Johnson's dissident union activity. In support of this argument the General Counsel argues that Martinez, who searched for but was unable to find the file in July 2013 when Johnson inquired about the matter at the union hall, speculated to Johnson that perhaps it had disappeared in 2009; further, that after the instant charge was filed and throughout the investigation of this matter the file did not materialize; and finally, that the file allegedly was not discovered until a week prior to the hearing. As noted, I have credited the testimony of Hatcher and Martinez, and the misplacing of the file and its recovery prior to the hearing does not seem to present, under the circumstances, a particularly unusual or improbable scenario. I find no merit to this argument of the General Counsel.

A union, as the employees' exclusive bargaining agent, must represent all unit members "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Further, "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion..." Ibid, at 191. See also *Roadway Express, Inc.* 355 NLRB No. 23 (May 21, 2010).

In Air Line Pilots Assn. v. O'Neill, 499 U.S. 65, 67 (1991), the Court states:

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We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" (citation omitted) as to be irrational.

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In San Francisco Web Pressmen & Platemakers Union (San Francisco Newspaper Printing Co., Inc.), 249 NLRB 88, 89 (1980), the Board summarizes a union's duty of fair representation as follows:

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Indeed, it has been recognized that negligent actions or inactions by a union do not alone constitute a breach of the union's duty of fair representation. (Citations Omitted) A union violates its duty of fair representation to bargaining unit members when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion." *Vaca et al. v. Sipes, 386 U.S.* 171, 191 (1967). We have recently stated that where, as here, a union undertakes to process a grievance, but decides to abandon the grievance short of arbitration, the finding of a violation turns on whether the union's disposition of the grievance was perfunctory

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dismissed. As a result of Johnson's failure to keep her address updated in the Union's database, I agree that the complaint should be dismissed on this basis. Cf. *Leach Corporation*, 312 NLRB 990, 992, fn. 8 (1993): ("Lack of clear and unequivocal knowledge...of the unfair labor practices is not attributable to any lack of diligence...in seeking relevant information."); SEIU Local 3036 (Linden Maintenance), 280 NLRB 995 (1986): (insufficient constructive notice, under the circumstances, to warrant dismissal under Section 10(b) of the Act).

or motivated by ill will or other invidious considerations. *Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.),* 240 NLRB 324 (1979). ... It is well settled that so long as it exercises its discretion in good faith and with honesty of purpose, a collective-bargaining representative is endowed with a wide range of reasonableness in the performance of its duties for the unit it represents. Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation.

As noted, there is no contention that the procedure established by the Union to review the some 700 pending arbitration cases was unlawful under the foregoing standards. There is no evidence that Johnson's grievance, from the outset, was treated any differently than the other grievances handled by the Union's representatives, including Hatcher and the review panel. And I have found that Hatcher, an experienced union representative, used his best judgment in evaluating the file documents and arrived at the reasonable conclusion that Johnson's grievance lacked merit. Accordingly, I find that the Union did not exceed the "wide range of reasonableness" that it is permitted in representing bargaining unit members. Moreover, I find it was not unreasonable or irrational for the Union, particularly given the size of the collective bargaining unit and the large number of grievances pending on the arbitration list and being evaluated for merit, to rely upon Johnson's address in the Union's database to advise her of the withdrawal of her grievance and the appeal process. I shall dismiss this allegation of the complaint.

The complaint also alleges that "Since about May 2013, and continuing to date, Respondent has failed and refused to inform the Charging Party about the status of her grievance." The individual who should have informed Johnson of the status of her grievance was, according to the General Counsel, Union Representative Martinez who, on July 11, 2013 advised Johnson that he did not know the status of her grievance. Martinez was unsuccessful in locating her file and within a short time suggested she could obtain the Employer's file directly from the Employer. Johnson, with the assistance of union representative Morrison did so. Having heard nothing further from Martinez, Johnson could have readily surmised that Martinez had no further information to give her about the matter. Insofar as the record shows, this was indeed the case.

Given this sequence of events, I find the evidence is insufficient to show that Martinez willfully misinformed Johnson about her grievance or willfully kept her uninformed about her grievance. While he may have been remiss, or negligent, or forgetful or preoccupied with other matters, there is no evidence indicating that his failure to advise Johnson that her grievance had been withdrawn over a year earlier was motivated by an intent to deceive. Cf. American Postal Workers Union, 328 NLRB 281, 282 (1999); Union of Security Personnel (Church Charity Foundation), 267 NLRB 974, 980 (1983). Accordingly, I shall dismiss this allegation of the complaint.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

- 1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.
- 2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended:

ORDER¹⁴

The complaint is dismissed in its entirety.

Dated: Washington, D.C. June 12, 2014

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Gerald A. Wacknov Administrative Law Judge

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¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.